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FEDERAL COMMUNICATIONS COMMISSION
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VIA HAND-DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II, Room TWA-325
445 Twelfth Street, SW
Washington, DC 20554

PCIA
Personal Communications Industry Association

Re: *Clarification of the Commission's Rules on Interconnection Between LECs and Paging Carriers,* CCB-CPD No. 97-24 *("SWBT Clarification Request")*

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185

Formal Complaints of Metrocall, Inc. against Various LECs, File Nos. E-98-14-18

Formal Complaint of USA Mobile Communications, Inc. II against CenturyTel of Ohio, Inc., File No. E-98-38

Formal Complaint of TSR Paging, Inc. against US WEST Communications, Inc., File No. E-98-10

Dear Ms. Salas:

On April 15, 1999, SBC Communications, Inc. ("SBC") made an *ex parte* filing with the Commission that contains the clearest admission to date of SBC's ultimate objective in the continuing battle over paging interconnection rights. SBC seeks, in the words of its own presentation, a return to the *"status quo ante,"* which in this instance means a step back to the time before the passage of the Telecommunications Act of 1996 (the "1996 Act").[1/] Obviously, SBC preferred the telecommunications marketplace when it was free to use its dominant market power to force paging carriers to pay for the facilities used to deliver SBC's own traffic to the paging carrier for local termination and to cross subsidize local services.

The arguments SBC makes in its effort to turn back the clock are familiar ones which have been considered and rejected repeatedly by this Commission, by multiple state public

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1/ Pub. L. No. 104-104; 110 Stat. 56 (codified at 47 U.S.C. §151 et seq. (1998)).

utility commissions and by several reviewing courts.[2/] In order to bring a new look to these old contentions, SBC has recast them in terms of economic (as compared to legal) principles. The SBC presentation contains a paper (the "SPR Paper") authored by John Haring and Jeffrey H. Rohlfs of Strategic Policy Research, Inc. ("SPR").[3/] The problem with this paper is that the economic arguments are based upon a series of demonstrably false premises. When the flaws in the foundation of the SBC position are revealed, the "economically efficient regime" the economists seek to construct completely crumbles.

False Premise #1: Paging Customers are the "Cost Causers"

The SPR Paper acknowledges, as it must, that the originator of a call (the "calling party") typically pays for the call because the calling party is the "cost causer" and thus is appropriately charged a rate designed to cover the traffic sensitive costs associated with the completion of the call.[4/] In the paging context, the application of this convention requires that the LEC (acting as a surrogate for its customers) bear the cost of facilities used to deliver calls originating on the LEC's network to paging carriers. It is, after all, the LEC who provides service to (and charges) the calling party.

2/ See, e.g. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15, 499 (1996) ("Local Competition First Report"); Petition for Arbitration of an Interconnection Agreement Between AirTouch Paging and US WEST Communications, Inc., Docket No. UT-990300 (WA UTC 1999) (Arbitrator's Report and Decision); Petition of AT&T Wireless Services, Inc. for the Arbitration of an Interconnection Agreement with US WEST Communications pursuant to 47 U.S.C. §252, Docket ARB16, Order No. 97-290 (OR PUC, 1997); Pacific Bell v. Cook Telecom, Inc., et al., No. C97-03900 CW, Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Cross-Motions for Summary Judgment (N. D. Ca. 1998); Petition of AT&T Wireless Services, Inc. for Arbitration of an Interconnection Agreement with US WEST Communications, Inc. pursuant to 47 U.S.C. §252 OAH Docket No. 3-2500-11080-20, MPUC Docket No. P-421/EM-97-371 (MN PUC1997) (Recommended Arbitration Decision); Petition for Arbitration of an Interconnection Agreement Between AT&T Wireless Services, Inc. and US WEST Communications, Inc., Docket No. UT-960381 (WA UTC 1997) (Arbitrator's Report and Decision); Petition of AT&T Wireless Services, Inc., for Arbitration of an Interconnection Agreement with US WEST Communications, Inc., Pursuant to 47 U.S.C. §252, Docket No. 97A-110T, Decision No. C97-656 (CO PUC 1997) (Commission Decision Regarding Petition for Arbitration).

3/ John Haring and Jeffrey H. Rohlfs, "An Economically Efficient Regime for Paging Interconnection" (April 14, 1999).

4/ SPR Paper, p. 14.

Section 51.703(b) of the FCC's rules and the Metzger Letter[5/] take this common sense approach.

SBC seeks to break this paradigm by claiming that the paging customer (*i.e,.* the called party) rather than the calling party is the "cost causer." The principal arguments advanced in support of this radical departure from the norm are that the telephone numbers associated with pagers are not generally published, and that paging customers therefore assume the role of cost causer by personally controlling the distribution of their number.[6/]

This position, in which SBC seeks to designate the paging customer as the cost causer, is nonsense. There are many categories of telecommunications customers who have unpublished numbers, including most cellular telephone subscribers, all holders of "unlisted" landline telephone numbers and most end users who have a second telephone line brought into their house. Indeed, most employees - - including many persons working at the FCC - - exercise personal control over the distribution of unpublished direct dial telephone numbers that ring at their desks. Yet, none of these end users is considered to be a cost causer who must pay for calls it receives.[7/] This is because the calling party - - the person with a pressing need to reach someone who takes the initiative to pick up the telephone and place a call - - is properly viewed as the one requesting the service being rendered and is the primary beneficiary of the communication.[8/]

The simple truth is that the effort to brand the paging customer as the "cost causer" is a transparent and unconvincing attempt to avoid the efficient regime created by the Telecommunications Act in which the originating carrier bears the cost of facilities used to deliver traffic to the terminating carrier.[9/]

5/ Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau, to Mr. Keith Davis, et. al., dated December 30, 1997, Docket No. CCB/CPD 97-24.

6/ SPR Paper, p. 14. Taking this argument to its logical end, the publication of telephone numbers would actually exacerbate this alleged problem, because more and more customers would be holding their numbers out to encourage calls.

7/ Although some cellular customers may pay for the airtime associated with incoming calls, the cellular carrier is not expected to pay for the interconnection facilities used to deliver the call from the LEC to the cellular carrier.

8/ SBC's consultants contend, without explanation, that the called party is the principal beneficiary. SPR Paper, p. 14. This is incorrect. In fact, as is the case with other called parties, the paging customer may have more important things to do than answer the particular page when it arrives.

9/ Indeed, this precise cost causer argument recently has been rejected by the Washington Utilities and Transportation Commission. Petition for Arbitration of an Interconnection Agreement Between AirTouch Paging and US WEST Communications, Inc., Docket No. UT-

False Premise #2: Paging Services and Traditional Telephone Services Are Not Competing Services

Throughout the SPR Paper, the authors assert that paging is a mere complement to rather than a substitute for local exchange service.[10/] SBC's consultants use this premise to erroneously conclude that paging carriers and LECs are not in competition, and to suggest as a result that according paging carriers the protections of the 1996 Act will not serve the pro-competitive goals of that landmark legislation.

The 1996 Act does not require telecommunications carriers to be direct competitors of the local exchange carriers in order to be accorded the interconnection protections of the statute. Nevertheless, it is ludicrous to claim that paging carriers and LECs are not competitors. Using SBC's consultants' own description, paging carriers and LECs clearly are engaged in "rivalrous behavior" designed to induce customers to choose their respective services over those offered by the other. When a working mother elects to initiate a call to a pager to contact her child rather than placing a series of calls to the telephones of her neighbors, a paging company has succeeded in substituting its network for a portion of the LEC's landline network. When a small business chooses to direct an e-mail message to the alpha numeric pagers carried by the members of its sales force rather than sending the message to their desktop computers which are connected to standard telephone lines, a paging carrier has succeeded in competing with the LEC. When a corporation sends a facsimile to a hand held wireless unit rather than to a facsimile machine attached directly to a telephone line, the paging service has acted as a direct substitute for a portion of the LEC landline network. These examples demonstrate that paging services cannot properly be viewed as mere complements to telephone service.[11/]

Another important aspect of the competitive mix is that paging services compete with various two-way wireless services which in turn, according to the SBC consultants, compete with traditional landline services. As a low-cost wireless communications option, paging services put downward pressure on the prices of other wireless services, and thus improve the prospect over time of wireless

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990300 (WA UTC 1999) (Arbitrator's Report and Decision), p. 35.

10/ SPR Paper, pp. 1, 6-7, 12-13, 15-16.

11/ SBC's consultants suggest that paging service is a complement to local telephone service just as a service station is a complement to, but not a substitute for, an automobile. SPR Paper, p. 6. A better comparison from the transportation industry would be to equate local telephone service to an automobile and paging service to a motorcycle. The two differ in terms of functionality, capacity and cost, and are not perfect substitutes for one another. Nevertheless, they are competing modes of transportation, and they are subject to the same basic rules of the road.

services becoming a substitute for landline service.[12] This paging role is properly viewed as the role of a competitor.

SBC's consultants have failed to cite any authority for the proposition that one service must be a perfect and complete substitute for another in order to be deemed an economic competitor. Most important, the Congress included no such economic test in the 1996 Act when it conferred interconnection rights on all telecommunications carriers. Congress conferred the right, and imposed related obligations, on all telecommunications carriers. The 1996 Act was purposefully crafted to promote competition in all segments of the telecommunications market, not just in the narrowly-defined two-way telephone exchange service market upon which SBC wishes to focus attention.[13] Indeed, the Commission itself has recognized the significant benefits that are being achieved precisely because wireless services are becoming more and more competitive with incumbent LECs.[14] The effort of SBC to halt this competitive trend by denying paging carriers the interconnection protections enjoyed by other telecommunications carriers cannot be allowed to succeed.

False Premise # 3: Paging Carriers Are Seeking "Free" Facilities or a "Subsidy"

Debunking the myth that paging customers are the "cost causer" also serves to address the false claims that paging carriers are seeking, or that the Metzger Letter accords, "free" facilities, and that LECs are being asked to subsidize paging services.[15] The Commission's rules and the Metzger Letter simply require that certain costs be assigned in the paging context in the same rational way they are assigned in virtually all other settings: the originator of the call assumes the responsibility for

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12/ Notably, paging carriers are competing directly with cellular and PCS carriers who are offering paging services in addition to their broadband services. These cellular and PCS providers are receiving termination compensation for calls terminating to paging devices. Paging providers, on the other hand, are receiving either no termination compensation or very little compensation compared to their competitors. This creates an uneven playing field and threatens to undermine the beneficial competitive role that paging will fill in the wireless marketplace if it is allowed to compete on an equal footing.

13/ See Attachment 1, which contains excerpts from PCIA's Brief Amicus Curiae filed with the United States Court of Appeals for the Ninth Circuit in Pacific Bell v. Cook Telecom, Inc., No. 98-16951.

14/ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services, Third Report, FCC 98-91 (rel. June 11, 1998), p. 26.

15/ SPR Paper, p. 1 (paging carriers are "cross subsidized"), p. 6 (the Metzger Letter gives paging carriers facilities "for free"), p. 18 (claiming paging carriers are getting "a zero price").

costs associated with delivering the call to the terminating carrier.[16/] There is no subsidy involved in allocating costs in this normal manner.[17/] However, an improper subsidy would be created if the SBC position prevails, at which point paging carriers would be forced unfairly to pay for the LEC's facilities used to deliver the LEC's own traffic to the paging company and to subsidize local rates.

The only appropriate means for a LEC to recoup the costs of facilities used to interconnect with paging carriers is to recover them in its standard telephone charges to end users. Contrary to the suggestion of SBC's consultants, the principles of basic connectivity and universal service do indeed dictate this result.[18/] Every telephone customer is a potential beneficiary of the ability to call a paging customer, and thus it is appropriate to have the costs of facilities used to connect with paging carriers borne by the LEC's customers, as is the case in the context of CLEC traffic. Any other approach would create serious competitive anomalies.[19/]

False Premise # 4: Paging Carriers Have the Incentive to Install Unnecessary and Uneconomic Facilities

The SPR Paper argues that the Commission's paging interconnection paradigm gives paging carriers an incentive to order far more capacity than the efficient amount.[20/] This is not true and it is not clear why SBC believes that paging carriers would have special incentives over other CMRS carriers to order unnecessary facilities. Paging carriers receive relief only from the portion of

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16/ Notably, the LECs were staunch advocates of the principle that the originator should bear the costs of calls when they opposed and defeated the use of an interim "bill-and-keep" arrangement for two-way CMRS carriers. The LECs argued that the carrier whose customers originated more calls (in that case the CMRS carrier because the vast majority of calls were mobile-originated) should pay more, because the calling party is properly viewed as the cost causer. See Local Competition First Report, para. 1109 (citing SBC's concern that "bill-and-keep is inappropriate where 80 percent of traffic is CMRS-to-incumbent LEC").

17/ Indeed one of the principal objectives behind the 1996 Act was to eliminate the subsidies built into local rates and thus to make the market competitive by assuring that all telecommunications carriers - - not just the ILECs - - get paid for services performed.

18/ See SPR Paper, pp. 13-15.

19/ For example, allowing LECs to place a surcharge on calls to paging numbers would destroy the level competitive playing field. This is particularly true since many other telecommunications carriers (*e.g.* PCS) provide one-way services which would not be subject to the surcharge, thereby imposing a substantial competitive disadvantage on pure paging companies. This would not be a technologically neutral result.

20/ SPR Paper, p 18.

facilities charges related to the delivery of local, LEC-originated traffic.[21] To the extent that interconnection facilities are used to deliver transit traffic, the paging carrier pays. To the extent that the interconnection facilities are used to deliver traffic that originates outside of the Major Trading Area (the "MTA"), the paging carrier pays. To the extent that the interconnection facility is used to deliver traffic that terminates outside of the MTA, the paging carrier pays. Moreover, it is the LEC, not the paging carrier, who has primary control over how to deliver its own traffic.[22] Because the paging carrier bears significant costs when it obtains interconnection facilities, it has no incentive to order unnecessary or uneconomic trunks.[23]

False Premise # 5: The Use of FX Lines
Imposes Unreasonable Costs on the LEC

According to SBC's consultants, the use by paging carriers of FX-like arrangements to accord customers access to numbers in different local calling areas subjects LECs to "egregious" cost.[24] In truth, the utilization of FX lines (in lieu of Type 2 links) often reflects an economically efficient configuration which reduces overall costs from the perspective of both the paging carrier and the LEC.

The most costly single component of the paging network is the paging switch, and a significant portion of the paging carrier's aggregate costs of transporting and terminating calls is assigned to the switching element. The use of FX-like arrangements reduces the number of switches that are required in the paging network, and thus reduces overall costs. As a result, the terminating compensation payments due to the paging carrier from the LEC are reduced, thereby according a direct economic benefit to the LEC.

Thus, using FX lines in lieu of installing additional switches does not serve to shift costs to the LEC. The LEC will either pay the costs directly (by bearing the cost of interconnection facilities) or indirectly (by paying terminating compensation to reimburse the paging carrier for additional transport and termination expenses). The only issue is whether the LECs pay the lower costs of FX

21/ See, e.g., 47 C.F.R.§ 51.703(b).

22/ LECs historically have, and continue to, demand control over decisions regarding facility configuration and quantity. To the extent LECs begin to comply with their obligation to bear financial responsibility for the facilities used to deliver their traffic to the paging network, LECs do have a valid interest in the type and quantity of facilities.

23/ The SPR Paper ignores a large portion of the costs of the paging network involved in the termination of telecommunications - - the RF piece. Paging carriers have invested hundreds of millions of dollars in transmitters, antennas, towers and monthly recurring site costs to see that LEC-originated telecommunications are completed.

24/ SPR Paper, p. 8.

lines or the higher costs of additional switching facilities. And, the principles espoused by SBC's consultants indicate that the LECs are better off to pay the directly-assignable cost of the dedicated FX-like facility than they would to pay a usage-sensitive terminating compensation charge which can only be roughly calculated to allow the paging carrier to recoup its additional switching costs.[25/]

False Premise # 6: Reciprocal Compensation is Determined By Assessing the LEC's Avoided Costs

Much of the SPR Paper is devoted to a discussion of the LEC's costs of interconnecting with paging companies, particularly via a Type 1 interconnection.[26/] Many aspects of the Type 1 discussion are inaccurate and misleading.[27/] For example, the SPR Paper argues that the LEC has few, if any, avoided costs when it interconnects with a paging carrier at the LEC end office, and thus the paging carrier should get less (if any) compensation in this arrangement.

The fundamental flaw in this argument - - besides ignoring the economics of Type 2 interconnection - - is that it ignores the statutory compensation standard. Ultimately, the appropriate compensation rate is determined by looking to the costs incurred by the terminating carrier, not at the avoided costs of the originating carrier.[28/] Notably absent from the SPR Paper is any indication that the functions performed by the paging carrier (and the resulting costs) differ depending upon whether it is interconnected in a Type 1 or Type 2 arrangement. As a consequence, there simply is no basis under the applicable compensation standard to single out paging carriers which utilize Type 1 interconnection for less favorable treatment. In this regard, it also is apparent that SBC's avoided cost analysis is flawed. As recorded in the arbitration between SBC's subsidiary Pacific Bell and a paging company Cook Telecom, Inc. demonstrates, Cook maintains 14 DS-1 connections in California, 10 of which are to Pacific tandems (*i.e.*, Type 2 connections). Of the remaining four, one is to an end office in which Cook has programmed full central office codes ("NXXs"). *Eighty percent* of Cook's traffic is to full NXXs. Pacific volunteered testimony that when calls are addressed to full NXXs, *Pacific avoids costs of .49 cents per call (in sharp contrast to the .156 cents compensation awarded to Cook for the termination of Pacific's calls*). Thus, LECs are avoiding costs when calls are terminated by paging carriers, even when there is a Type 1 interconnection.

25/ See SPR Paper, p. 16.

26/ SPR Paper, pp. 1-10.

27/ The SPR Paper incorrectly suggests that the use of Type 1 interconnection is solely a paging phenomenon and that Type 1 facilities are the most prevalent paging arrangements. SBC's consultants fail to acknowledge that paging carriers historically were forced by the LECs themselves to adopt Type 1 arrangements through restrictive Type 2 policies and various pricing mechanisms.

28/ 47 U.S.C. §252(d).

False Premise #7: The Interexchange Model
is an Apt Analogy for Paging Interconnection

SBC's consultants claim that the interexchange model is an appropriate analogy for paging interconnection.[29/] According to SBC's consultants, like the interexchange carrier ("IXC"), the paging carrier should pay for all facilities used to deliver the LEC-originated traffic to the paging carrier and the paging carrier would not be entitled to terminating compensation from the LEC.[30/] This proposition has no merit because the facts and premises underlying the IXC model are not present and do not apply to LEC/paging interconnection.

Interexchange calls are handled by three carriers - - the carrier who provides originating access, the carrier providing terminating access, and the IXC. Although the originating access carrier has a relationship with the calling party, the IXC also has a direct relationship with the calling party because it performs services directly for that person. Accordingly, when the calling party (the cost causer) places an interexchange call, it is requesting services directly from its IXC. The IXC charges and receives from the calling party an amount sufficient to cover the costs the IXC incurs to provide the service to the calling party and to pay the originating and terminating access charges applicable to the call. Thus, the IXC model reflects another instance in which the cost causer (the calling party) bears the costs of the communication he/she initiates. The only difference is that, in this instance, the IXC is acting as the surrogate for the calling party in paying for the interconnection facilities.

The application of the interexchange model to LEC/paging interconnection is not appropriate. In the LEC/paging interconnection context, the LEC serving the calling party has the only relationship with the calling party; thus, the paging carrier does not have an ability to recoup its costs from the person requesting the services - - the calling party (*e.g.*, the cost causer). Thus, unlike the IXC context, the terminating paging carrier would have no way to secure compensation for the costs it incurs.[31/]

29/ SPR Paper, p. 7.

30/ Indeed, it is not clear from the SPR Paper whether the paging carrier would, in SBC's view, be entitled to compensation from anyone.

31/ If SBC's position were adopted with all of its logical consequences, then the calling party would become the paging carrier's customer. The LEC would then need to provide to the paging carrier all the same billing information it does for the IXCs - - and it would also be required to provide billing services, just as it does for IXCs. PCIA suspects that SBC would oppose providing such information and services.

Conclusion

Based on the foregoing, the Commission must conclude that the latest SBC presentation fails to provide any sound basis for abandoning the reasoned paging interconnection protections reflected in the Local Competition First Report, the implementing regulation and the Metzger Letter. While LEC/paging interconnection agreements are starting to fall into place, those agreements typically are being reached at significant expense (including preparation of cost studies) to paging carriers, most of which cannot afford such expenses and therefore are not able to enjoy their statutory rights. Moreover, under the current paradigm for paging interconnection negotiations, as interpreted by the LECs, LECs have no incentive to voluntarily negotiate agreements which provide paging carriers termination compensation or relief from facilities charges. There are important steps that the Commission can and should take to improve the process. First and foremost, the Commission should resolve the pending complaints brought by paging carriers against LECs who are ignoring their clear responsibilities under the FCC's rules. SBC should not succeed in its effort to completely undo the progress that has been made.

Respectfully submitted,

Angela E. Giancarlo

Robert L. Hoggarth, Esquire
Angela E. Giancarlo, Esquire

cc: Bob Atkinson
Jane Jackson
Janice Jamison
David Konuch
Ed Krachmer
Rich Lerner
James Schlicting
Janet Sievert
Larry Strickling
Thomas Sugrue
Yog Varma

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Attachment 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16951

PACIFIC BELL, a California corporation,
Plaintiff-Appellant,
v.

COOK TELECOM, INC., a California corporation,
Defendant-Appellee,

and

COMMISSIONERS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF *AMICUS CURIAE* FOR THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF AFFIRMANCE

Angela E. Giancarlo, Esquire
Personal Communications Industry Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561
(703) 535-7487
Counsel for *Amicus Curiae* Personal Communications Industry Association
April 13, 1999

LEC traffic to paging carriers for local termination. Paging entitlement issues are at the core of the PacBell appeal.

Based on the foregoing, PCIA has a legitimate and cognizable interest in the outcome of this proceeding and a substantial basis in experience from which to address the matters in issue.

It is not PCIA's intention to reargue in this brief matters that have been ably presented by Appellees Cook and the PUC. Rather, PCIA intends to draw upon its industry-wide vantage point to highlight the important "big picture" issues that are presented by this case and which must be resolved in the correct manner in order for the important public interest objectives of the 1996 Act to be achieved.

II. Paging Carriers Are Protected by the 1996 Act

PacBell, and its supporters, seek to deny paging carriers any entitlement to compensation for carrying LEC traffic. This effort must fail. The language of the 1996 Act, its legislative history, binding rulings of the FCC (which is expressly charged with implementing the Act) and sound telecommunications policy considerations all compel the conclusion that

paging carriers are legally entitled to be paid for delivering local telecommunications traffic originating on the LEC network.

A. The Language of the Statute

PacBell would have this Court believe that the 1996 Act was a narrowly focused piece of legislation designed merely to require "competing local telephone companies to interconnect with another." PacBell Brief, p.1. In the telecommunications world as PacBell, USTA and US West would like it to be, the right to be compensated for terminating LEC-originated traffic under the 1996 Act would be accorded only to a select group of telecommunications companies which provide a full range of two-way local telephone exchange services that act as complete substitutes for traditional landline telephone services.[3/] No serious attention can be given to this claim. The plain language of the statute shows that the

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3/ *See* PacBell Brief, pp. 11-12. (compensation is due "only between two competing providers of local telephone service, both of whom are capable of originating and terminating local calls"); USTA Brief, pp. 17-18 (The 1996 Act was intended to benefit "new entrants in the provision of local exchange service," which does not in US West's view include paging carriers); USTA Brief, p. 9 (the 1996 Act was designed to promote local exchange competition and "cannot be applied to paging providers").

entitlement to compensation was not to be limited to a narrow class of competing providers of traditional local telephone exchange service. The 1996 Act added expansive definitions to the Communications Act of 1934. For example, the terms "telecommunications,"[4/] "telecommunications service"[5/] and "telecommunications carrier" were modified to reflect the current telecommunications environment.[6/] Congress explicitly indicated that these new, broad definitions were "intended to include commercial

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4/ Section 3(43) of the Act, 47 U.S.C. § 153(43), defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." Communications to paging receivers of Cook (and other paging carriers) meet this definition. Cook Brief, p. 11.

5/ Section 3 (46) of the Act, 47 U.S.C. § 153 (46), defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Cook, and other paging carriers, provide "telecommunications service." Cook Brief, p. 11.

6/ Section 3(44) of the Act, 47 U.S.C. § 153 (44), defines a "telecommunications carrier" as "any provider of telecommunications services" (but not a mere "aggregator"). Paging service providers provide telecommunications service, and are not "aggregators" as defined in Section 226 of the Act.

mobile service" [7/] and that "mobile service" includes "both one-way and two-way radio communications service. [8/] Thus, by extending the protections of Section 251(b)(5) to all who transport and terminate "telecommunications," Congress clearly sought to benefit a broad class of communications companies, including paging carriers.

This conclusion is easily confirmed by reviewing the structure and terms of Section 251(b) of the Act. This statutory provision sets forth certain special obligations of all local exchange carriers (including PacBell). Notably, each subsection is carefully crafted to delineate precisely the intended beneficiaries. For example, the duty not to prohibit resale apples to *all* "telecommunications services." 47 U.S.C. § 251(b)(1). In contrast, the duty to provide dialing parity only runs to "competing providers of telephone exchange service and telephone toll service." 47 U.S.C. §

7/ *P. Huber, M. Kellogg, J. Thorne, The Telecommunications Act of 1996, Special Report* (1996), p. 281 (indicating that the Senate ceded to the House definition of telecommunications carrier at p. 279 and quoted herein).

8/ 47 U.S.C. § 153(27).

252(b)(3). Of primary concern here, the compensation entitlement runs to *all* who transport and terminate telecommunications. 47 U.S.C. §251(b)(5).

PacBell and its supporters properly concede that when interpreting legislation, the Court "must begin with the words of the statute,"[9/] and that [i]t is a fundamental canon of statutory construction that the words of the statute must be read in their context and with a view to their place in the statutory scheme."[10/] Here, the context makes clear that whenever Congress intended for certain provisions to apply only to competing providers of local telephone exchange service, it specifically said so. *See, e.g.*, Section 251(c)(2)(A) (according certain protections only to those engaged in "the transmission and routing of telephone exchange service and exchange access.")

USTA's brief argues at length that because Congress limited *some* of the protection in Section 251(b) to competing providers of telephone

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9/ PacBell Brief, p. 27, *citing Walleri v. Federal Home Loan Bank of Seattle*, 83 F.3d 1575, 1581 (9th Cir. 1996) and *Lehman v. United States*, 154 F.3d 1010, 1014 (9th Cir. 1998)

10/ USTA Brief, p. 8, *citing Davis v. Michigan Dep't of Treasury* 489 U.S. 803, 809 (1989).

exchange service, the Court should construe the statute to limit *all* of the Section 251(b) protections in the same fashion. USTA Brief, pp. 6-9. This argument runs completely counter to well-established rules of statutory construction which provide that Congress may be presumed to mean different things when it uses different words in the same statutory section. *See, e.g., Russell v. United States*, 464 U.S. 16, 23 (1983). The correct statutory interpretation is that the entitlement to compensation under Section 251(b)(5) is not just available to competing providers of two-way local telephone exchange service, but rather is available to all carriers who deliver another carrier's telecommunications traffic.

B. The Legislative History

The legislative history also makes it clear that the 1996 Act was not intended to narrowly target providers of traditional two-way local telephone exchange services. The stated purpose of the 1996 Act, as set forth in the preamble, is:

> To promote competition and reduce regulation in order to secure lower prices and higher quality of service for American telecommunications

> consumers and encourage the rapid deployment of new telecommunications technologies.

Notably absent from this declaration of statutory intent is any indication or suggestion that the local telephone exchange market was the sole focus of the 1996 Act. And, the legislative history confirms the fact that Congress purposefully intended to paint with a broad brush. As stated in the *Joint Explanatory Statement of the Committee of Conference,*[11/] the purpose of Sections 251 through 261 of the Act was broadly stated to be a serious effort to "create competitive communications markets."[12/] This language simply cannot be construed to reflect the narrow focus on local telephone exchange services advocated by PacBell and its supporters.

The error in the PacBell position is conclusively established by the fact that Congress considered *and rejected* language from the House of Representatives version of the bill which would have extended

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11/ *See* Conf. Rep. No. 230, 104, 2nd Sess. 1 (1996) ("*Joint Explanatory Statement*").

12/ *Joint Explanatory Statement*, reprinted in *P. Huber, M. Kellogg, J. Thorne, The Telecommunications Act of 1996, Special Report* (1996), p. 283.

compensation rights only to "a competing provider seeking to offer local telephone service over its own facilities."[13/] This language was rejected by the Conference Committee in favor of a broader formulation which broadened the right to compensation to *all* who transport and terminate "telecommunications."[14/] Thus, the situation at hand is one where "the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered and rejected" language that would have supported the PacBell position. *Tanner v. U.S.*, 483 U.S. 107, 125 (1987). As the Supreme Court recognized in *INS v. Cardoza-Fonesca*, 480 U.S. 421, 442-43 (1987), "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio*

13/ H.R. Conf. Rep. No. 104-458 at 120 (1996). Although US West cites this language (US West Brief, p. 7), it fails to acknowledge the obvious significance of the fact that this language did *not* find its way into the final bill or into the Joint Explanatory Statement.

14/ *Compare* H.R. 1555 104th Cong., 1st Sess. (1996), § 242(b)(5) with S.652 104th Cong. (1996), § 251(b)(8). As is discussed within, the term "telecommunications" is broadly defined and clearly includes calls to paging receivers. *See* discussion *supra at II(A)*.

to enact statutory language that it has earlier discarded in favor of other language."

C. The Controlling FCC Rulings

The Supreme Court of the United States recently and resoundingly established the preeminent role of the FCC in interpreting and implementing the provisions of the 1996 Act. *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999). This ruling leaves no doubt that the FCC has rightly and properly adopted rules confirming the right of paging service providers to be compensated for delivering LEC-originated traffic to paging customers. At *not one but two* places in its *Local Competition First Report*,[15/] the FCC expressly held that LECs are obligated pursuant to Section 251(b)(5) of the Act to enter into compensation arrangements with all "CMRS providers, **including paging providers**" *Id.* at paras. 34 and 1008 (emphasis added).[16/]

15/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15,499 (1996) (*Local Competition First Report*).

16/ The Act defines "commercial radio service" as any one-way or two-way mobile radio communication service interconnected to the public switched telephone network (the "PSTN") that is provided for a profit to a

(continued...)

Contrary to PacBell's argument,[17] this ruling clearly is encompassed in the FCC's implementing regulations. Section 20.11 of the FCC rules, which predated the 1996 Act but was acknowledged by the FCC and preserved in the *Local Competition First Report*,[18] provides that:

> A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originated on facilities of the local exchange carrier.

16/ (...continued)
substantial portion of the public. 47 U.S.C. §§ 3(27), and 332(d). The Commission has explicitly recognized that paging service providers meet this definition. *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, 1450 (1994) (the "*Regulatory Parity Order*"). The Commission adopted the term CMRS when defining the category of carriers who provide "commercial radio service" under Section 332 of the Communications Act. *Id.* at 1413. Thus, there is no difference between "commercial mobile service" as used in the Act and commercial mobile radio service (or CMRS) as used by the Commission.

17/ PacBell variously claims that there is "a disconnect" between the text of the *Local Competition First Report* and the implementing regulations, that there are "internal contradictions" between the order and the rules, and that the FCC's ruling contains "ambiguous statements." PacBell Brief, pp. 12, 13 and 24. In truth, it appears that PacBell is seeking to create ambiguity where none can be found. *See* Cook Brief, Section VI.A.2.

18/ The Commission amended Section 20.11 by adding a new subsection (c), but left subsections (a) and (b) intact. *Local Competition First Report*, Appendix, B at pp. B-5.

47 C.F.R. § 20.11(b). Lest there be any doubt that the benefits of the FCC's compensation rulings extend to one-way paging carriers, the Court need only look to Section 51.711(c) of the rules that directs state commissions to "establish the rates that licensees in the Paging and Radiotelephone Service ... may assess upon other carriers ... based upon forward looking costs."[19/] Given this explicit reference in the rule to "paging," there can be absolutely no doubt that the orders, rules and regulations of the expert federal administrative agency primarily charged with the implementation of the 1996 Act establish the entitlement of paging carriers to compensation pursuant to Section 251(b)(5) of the Act.

D. Communications Policy

Finally, PCIA must note that Congress' decision, as confirmed by the FCC, to extend the benefits of the 1996 Act to a broad class of potential

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19/ 47 C.F.R.§ 51.711(c). This rule, though vacated by the 8th Circuit on jurisdictional grounds, was one of the "pricing rules" found by the Supreme Court to be within the FCC's jurisdictional authority, and thus properly adopted. *See Iowa Utilities Board v. FCC*, 120 F. 3d 753, n. 21 (8th Cir. 1997) *modified on rehearing, Slip Op.* (8th Cir., Oct. 14, 1997), *aff'd in part and rev'd in part, AT&T v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). The TELRIC pricing standard reflected in this rule may be subject to further proceedings on remand to the 8th Circuit.

competitors in the telecommunications market - - including wireless carriers - - is clearly sound as a matter of enlightened communications policy. The 1996 Act is intended "to provide for a pro-competitive, deregulatory national policy framework ... by opening *all* telecommunications markets to competition."[20/] Wireless telecommunications is one of the most important and dynamic sectors of the newly competitive industry. As the FCC concluded in its *Third Annual CMRS Competition Report*[21/]

> In addition, this past year has seen the beginnings of a shift in the relationship between wireless and wireline services. A number of wireless technologies have begun to take aim at services long thought of as the sole province of wireline operators. For example, a number of operators are deploying networks using fixed wireless technologies to compete with wireline local exchange service. In addition, mobile telephone operators are beginning to go one step further by using aggressive pricing to position their services as true replacements for the wire-based

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20/ *Joint Explanatory Statement,* reprinted in *P. Huber, M. Kellogg, J. Thorne, The Telecommunications Act of 1996, Special Report* (1996), p.277.

21/ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 98-91, 1998 FCC LEXIS 2816, released June 11, 1998.

> services of LECs. Other companies are using wireless technology to capitalize on the exploding demand for Internet access and provide individual customers with services which are comparable, if not superior, to what they can obtain using wireline equivalents.

And, one-way paging services providers are playing an important role in this competitive revolution. One-way paging services can be used to deliver not only tone alerts and numeric messages, but also voice messages, facsimiles and electronic-mail ("e-mail"). Each of these functionalities provides an important alterative to the monopoly landline telephone network. Thus, while PacBell boldly asserts that "one-way paging is *not* a substitute for ordinary telephone service,"[22/] the truth is that paging is an important low-cost communications alternative that is starting to provide precisely the kind of competitive check on the ILECs that Congress desired. This being the case, the Court certainly should not accept the invitations of PacBell, USTA and US West to narrowly construe the provisions of the landmark legislation embodied in the 1996 Act.[23/]

22/ PacBell Brief, p. 2.

23/ The foregoing discussion establishes beyond a doubt that paging
(continued...)